Supreme Court, U.S.
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No. 98-1854

In The

Supreme Court of the United States

CHIBU C. ANAEME,

Petitioner,

v.

DIAGNOSTEK, INC.; HEALTH CARE SERVICES; AND HPI,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 DISCLOSURE

Diagnostek, Inc.

McKesson MedManagement, LLC

McKesson HBOC, Inc.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is an unexceptional case which presents no important question of federal law and no circuit conflict. Petitioner Chibu Anaeme brought a disparate impact and disparate treatment claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), and a 42 U.S.C. § 1981 claim ("Section 1981"), against Diagnostek, Inc., Health Care Services, and HPI (hereinafter collectively referred to as "Diagnostek"). Anaeme claimed he had submitted applications to be a pharmacist at Diagnostek, but Diagnostek did not interview him or select him for the pharmacist position based on his race. The District Court granted summary judgment in favor of Diagnostek on Anaeme's Title VII disparate impact claims (App. at 28a-38a).[1] The Title VII disparate treatment and § 1981 claims were presented to and decided by a jury. At the close of Diagnostek's case, the District Court denied Anaeme's motion for a judgment as a matter of law (App. at 2a). The jury returned a verdict in favor of Diagnostek, finding that race was not a determining factor in Diagnostek's failure to hire Anaeme (App. at 2a). The District Court denied Anaeme's motion for a new trial (App. at 21a-26a). The Tenth Circuit unanimously affirmed (App. at 1a-20a).

No compelling reason exists to grant the petition for a writ of certiorari in this unremarkable employment discrimination case. There is no circuit conflict and no

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[1] That decision was not appealed to the Tenth Circuit and is not part of Anaeme's Petition.

important question of federal law. Despite Anaeme's tortured framing of two issues, this case is only about whether the jury's verdict is supported by sufficient evidence, an issue particularly ill-suited for Supreme Court review.

COUNTER STATEMENT OF THE CASE

Anaeme's Petition is fraught with misstatements and omissions. Specifically, Anaeme omits important portions of the record evidence which support the jury's verdict. Furthermore, the Petition buries a significant and controlling fact – a jury considered the evidence presented by both Anaeme and Diagnostek and rendered a verdict in favor of Diagnostek. In an attempt to frame his issues as legal rather than factual ones, Anaeme disregards or minimizes the substantial evidence presented to the jury which established legitimate reasons why he was not hired and upon which the jury rightfully based its verdict.

Anaeme argued at trial that he applied for a pharmacist position with Diagnostek by submitting applications and resumes on numerous occasions (Pet. at 3). Diagnostek presented evidence that it did not have a record of Anaeme's application, which meant one of three things: 1) Anaeme did not apply for the position; 2) Anaeme's applications were lost or discarded; or 3) Anaeme's applications were rejected because of facial deficiencies (App. at 8a). Diagnostek also presented evidence that, based on the applications and resumes Anaeme claims he had submitted, the third reason was most likely as Anaeme's

applications and resumes were facially deficient (App. at 8a).

Anaeme states that "all facts which may have legitimately weakened the petitioner's prospects were learned by the respondent after the hiring process had been completed and after the initial stages of the litigation process had commenced" (Pet. at 11). This statement misrepresents the record evidence, and under Supreme Court Rule 14(4) is sufficient reason to deny the Petition. The record evidence established, or sufficiently established for purposes of the lower courts' review of the jury's verdict, that Anaeme's applications and resumes contained deficiencies which were ascertainable simply by reviewing the documents and that Diagnostek's practice was to reject any application containing such facial deficiencies (App. at 8a). If, as Anaeme alleges, Diagnostek received at least four applications and resumes from Anaeme and sent acknowledgment letters to Anaeme, then Diagnostek was able to evaluate those applications and resumes at that time. The facial deficiencies the Diagnostek witnesses identified at trial were the same facial deficiencies Diagnostek would have identified when it received the applications and resumes:

* Anaeme's applications and resumes contained omissions and inconsistencies on questions about employment history, names and phone numbers of supervisors, as well as dates of employment (App. at 8a).

* Anaeme's applications and resumes also revealed that Anaeme had held many positions, but had failed to remain in any one position for very long (App. at 8a).

* Diagnostek's practice was to reject any application which contained such facial deficiencies (App. at 8a).

This record evidence is substantial and fully supportive of the jury's verdict, but glossed over by Anaeme in his Petition.

Additional record evidence supported the jury's verdict. Anaeme argued that Diagnostek had not hired any African-American pharmacists during the time period in which he was applying for the pharmacist position. In fact, Diagnostek had hired and offered employment to African-American pharmacists during the same time period during which Anaeme was applying (App. at 18a-19a).

REASONS WHY THE WRIT SHOULD BE DENIED

I. Petitioner Fails To Present An Important Question Of Federal Law, A Conflict Among The Circuits, Or Any Other Compelling Reason Why This Court Should Accept Review Of This Case

Anaeme does not allege that this case involves any conflict among the circuits. Rather, Anaeme argues that this case raises an important question of federal law. However, neither the District Court nor the Tenth Circuit found that this case turned on some important question of federal law. They viewed the case as a straightforward sufficiency of the evidence case that properly belonged to the judgment of the jury and that the jury's judgment was well supported by evidence. Both the District Court and

the Tenth Circuit correctly relied upon this Court's decisions governing proof in employment discrimination cases. More important, both the District Court and the Tenth Circuit correctly applied the law to the facts, and their decisions are in full accord with this Court's employment discrimination decisions. There simply is nothing noteworthy about this case.

Despite Anaeme's assertion otherwise (Pet. at 5), this case does not involve "a substantial question about the nature of 'burden-shifting' under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)." As the Tenth Circuit correctly stated, "after a full trial on the merits, the steps in the burden-shifting framework of *McDonnell Douglas* are largely irrelevant" (App. at 5a-6a n. 2). This is in full accord with this Court's holdings. *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (once a defendant produces evidence of a legitimate, non-discriminatory reason for its actions, and the case is submitted to a jury for determination, the *McDonnell Douglas* presumption drops from the case). In fact, this Court has reaffirmed time and time again that the ultimate inquiry in a racial discrimination case is whether the defendant intentionally discriminated against the plaintiff because of his race. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). Thus, Anaeme's concentration on burden-shifting misses the point. The only issue is whether there is sufficient evidence to support the jury's finding that Diagnostek had not discriminated against Anaeme, and both the District Court and the Tenth Circuit held that there is. Reweighing evidence should not be the role of this Court,

especially here where both the District Court and the Tenth Circuit performed a careful review of the evidence.

The jury's verdict is fully supportable even under the burden-shifting framework of *McDonnell Douglas*. Anaeme's principal argument is that he presented a *prima facie* case and Diagnostek failed to present a legitimate, nondiscriminatory reason for not interviewing or hiring Anaeme. This Court has described a defendant's burden of production in this regard on several occasions. The basic rule is that once a plaintiff has established a *prima facie* case, the employer must articulate some legitimate, nondiscriminatory reason for its action. *McDonnell Douglas*, 411 U.S. at 802. "[T]he employer's burden is satisfied if he simply 'explains what he has done' or 'produc[es] evidence of legitimate nondiscriminatory reasons.' " *Burdine*, 450 U.S. at 256 (citation omitted). In fact, this Court has not even required that the defendant's proffered reason be credible. In *Hicks*, this Court held that the defendant only is required to present evidence which, *if taken as true*, would permit the conclusion that there was a nondiscriminatory reason for its actions. 509 U.S. at 509. The court must not make a credibility assessment of the defendant's evidence because that function is reserved for the jury. *Id.* In discussing the defendant's burden of production, this Court has continuously reiterated that the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Hicks*, 509 U.S. at 507 (citing *Burdine*, 450 U.S. at 253).

Through a hypertechnical application of the burden-shifting analysis, Anaeme attempts to avoid his burden of

proving intentional discrimination by arguing that Diagnostek's evidence failed to sustain its burden of production. However, as this Court has pointed out, "[t]he prima facie case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic.' " *Aikens*, 460 U.S. at 715. To the contrary, "it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical questions of discrimination." *Id.* (citation omitted). In fact, this Court in *Aikens* cautioned against using the "basic allocation of burdens and order of presentation of proof" in deciding the ultimate questions of fact, *i.e.*, did the defendant intentionally discriminate against the plaintiff. *Aikens*, 460 U.S. at 716 (citing *Burdine*, 450 U.S. at 252).

As the District Court and Tenth Circuit correctly found, Diagnostek *did* articulate a legitimate, non-discriminatory reason for not interviewing or hiring Anaeme which was supported by admissible evidence. Anaeme misstates the record and claims that Diagnostek "*assert[ed] only* that [it] had no recollection or record of receiving applications from the petitioner" and therefore failed to meet its burden of production (Pet. at 6) (emphasis added). In fact, Anaeme goes as far as to inaccurately claim a "total lack of evidence of an alternate reason for rejecting the applicant" (Pet. at 10). These statements ignore the substantial evidence Diagnostek presented to the jury which established that Anaeme was not hired based on deficiencies appearing on the face of the applications and resumes. It also ignores the substantial evidence reflecting the hiring of African-Americans at the same time Anaeme was applying. Although Anaeme

would like the Court to only consider the evidence supporting his claim, Supreme Court Rule 14(4) requires "accuracy . . . [with] whatever is essential to ready and adequate understanding of the points requiring consideration." Ignoring or dismissing so much vitally important record evidence, as Anaeme does in his Petition, fails to comply with Supreme Court Rule 14(4) and warrants denial of the Petition.

Anaeme focuses his entire Petition on one argument presented by Diagnostek – that Anaeme did not apply because it did not possess his applications or resumes – and discusses at great length the evidence he presented which rebutted this evidence (Pet. at 9). However, neither *McDonnell Douglas*, nor any other decision by this Court, holds that all the plaintiff must do to prevail is disprove the employer's asserted reason for its actions. *Hicks*, 509 U.S. at 514-15. To the contrary, this Court has held that the plaintiff must affirmatively prove by a preponderance of the evidence that the defendant intentionally discriminated against him because of his race, and that a jury is entitled to find in favor of the defendant even if the employer's articulated reason is deemed untrue. *Hicks*, 509 U.S. at 523-24. Thus, even if Anaeme successfully rebutted one of Diagnostek's articulated reasons for its actions, Anaeme would not be entitled to judgment as a matter of law. Furthermore, the absence of personnel records is not something that this Court has found probative of a discriminatory animus. In *Hicks*, this Court considered this scenario in a hypothetical and found "[t]he notion that every reasonable employer keeps 'personnel records' on people who never become personnel, showing why they did not become personnel (*i.e.*, in what

respects all other people who were hired were better)" was "highly fanciful." 509 U.S. at 514 n. 5.

Anaeme may not like the evidence supporting the jury's verdict, may not consider it significant, or may believe that the jury should not have credited it. However, the quality and weight of the evidence was for the jury to determine. In *Hicks*, this Court underscored this principle: "That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review. . . . " 509 U.S. at 524. The fatal problem with Anaeme's Petition is that he refuses to accept the fact that his disagreement with the jury's assessment of the quality and weight of the evidence is not a proper ground for review by this Court. It is not even grounds for overturning the verdict or holding a new trial.

II. Petitioner's "Questions Presented" Constitute Nothing More Than A Request For This Court To Reweigh The Evidence That Has Already Been Considered By A Jury

Anaeme's two proposed issues are merely veiled sufficiency of the evidence arguments. The "Questions Presented" by themselves and on their face illustrate how fact-specific this case is. Anaeme essentially asks this Court to focus on evidence supporting his claim, dismiss evidence supporting the jury's verdict, reach a different conclusion than the jury, and mandate a finding in his

favor. Assuming the role of juror is not a proper function of this Court.

Although Anaeme minimizes the import of this fact, a jury *did* hear all the evidence from both Anaeme and Diagnostek in this case. The jury is in a much better position than a reviewing court to assess the credibility of the witnesses and weigh their testimony. Properly instructed,[2] the jury evaluated the evidence and determined that Diagnostek had not discriminated against Anaeme because of his race. In arguing that this verdict contradicted the weight of the admissible evidence (Pet. at (i)), Anaeme fails to address the substantial evidence which supports the verdict (*i.e.*, Anaeme's applications and resumes contained omissions and inconsistencies on questions of employment history and showed that Anaeme had failed to establish a stable work history by remaining at any one job for a substantial period of time). Based on this evidence, the jury could have determined (and in fact did determine) that when Diagnostek received Anaeme's application, it rejected Aname based on these facial deficiencies and not because of Anaeme's race.

Anaeme's argument that the Tenth's Circuit's opinion will result in an abundance of disingenuous defendants claiming a failure to keep records as a defense for race discrimination claims (Pet. at 10) is groundless speculation. Employers are not going to destroy or not maintain

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[2] Underscoring the absence of any legal issue in Anaeme's Petition is the fact that Anaeme makes no claim of error in the jury instructions.

employment records based on the Tenth Circuit's decision. The absence of records makes the employer's task more difficult, so it is silly to suggest that employers will purposefully destroy or not maintain records. The Tenth Circuit's decision simply has no impact beyond the specific facts in this case. The fact-specific character of this case is why it is ill-suited for review by this Court.

III. Petitioner Has Waived Any Objection Regarding Bifurcation Of The Trial Because He Failed To Request Bifurcation Or Otherwise Preserve This Issue For Appeal

Anaeme bases his claim that he is entitled to a new trial on the fact that the District Court "improperly failed to bifurcate the [liability and damage] proceedings" (Pet. at 12). Anaeme neglects to mention, however, that *he never asked* the District Court to bifurcate the proceedings, either before or during trial or in his motion for new trial (App. at 20a, 24a-25a).[3] Thus, Anaeme has waived his right to raise an issue concerning bifurcation. The Tenth Circuit recognized this and declined to address Anaeme's argument (App. at 20a).

Despite Anaeme's waiver, the Tenth Circuit went on to conclude that, even if the District Court could have bifurcated the proceedings in this case on its own motion, it saw no abuse of discretion in not doing so (App. at

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[3] Anaeme also ignores the fact that he requested and received a limiting instruction which directed the jury to consider the "after-acquired" evidence "only on the issue of damages" (App. at 24a-25a). Anaeme does not argue that the instruction was erroneous.

20a). Determinations regarding the order of trial which are governed by an abuse of discretion standard are poorly suited for review by this Court. Significantly, Anaeme fails to cite a single case where a court found legal error in not bifurcating the liability and damages determinations in an employment discrimination case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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